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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 578

SOUTHERN RAILWAY COMPANY,
Petitioner,

vs.

THE UNITED STATES.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

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No. 578

SOUTHERN RAILWAY COMPANY,
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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS AND BRIEF IN SUPPORT THEREOF.

Petition.

Petitioner prays this Court to review on writ of certiorari a judgment of the Court of Claims of the United States, in the case there entitled *Southern Railway Company* v. *The United States,* No. 45227, rendered on the 4th day of October, 1943 (R. 47), and based upon a written opinion by that court rendered on the same date (R. 25-47).

I.

Summary Statement of the Matter Involved.

This was an action by Southern Railway Company, plaintiff below, petitioner here, to recover certain undercharges alleged to be due for the transportation of various ship-

ments of Government-owned property. There were three causes of action. On the first cause of action, petitioner sought judgment in the amount of $9,512.22, and respondent counterclaimed for $1,618.41 claiming an overcharge rather than an undercharge on the shipments involved. On the second cause of action, petitioner sought a judgment for $1,043.14. On the third cause of action, petitioner sought judgment for $324.77. Respondent conceded that petitioner was entitled to recover said sum and this cause of action is not here involved. The court below denied petitioner a recovery on its first and second causes of action and offset the amount it was entitled to recover on its third cause of action against respondent's counterclaim in the first cause of action, and entered judgment for the respondent in the amount of $1,251.73.

On November 29, 1933, petitioner and respondent entered into an agreement entitled "Freight Land-Grant Equalization Agreement," relative to transportation charges on shipments of Government property. This agreement was in full force and effect during the time the shipments involved in the first and second causes of action moved, and by the terms thereof petitioner agreed:

> "To accept for the transportation of property shipped for account of the Government of the United States and for which the Government of the United States is lawfully entitled to reduced rates over land-grant roads, the lowest net rates lawfully *available*, as derived through deductions account of land-grant distance from the lawful rates filed with the Interstate Commerce Commission *applying* from point of origin to destination at time of movement."[1]

It is shown of record (R. 48-49) and admitted in respondent's brief in the court below that the purpose of this

[1] Italics ours unless otherwise indicated.

agreement is to obtain for petitioner traffic which might otherwise move over competing land-grant routes. On page 180 of respondent's said brief, the following appears:

> "It need not be questioned, therefore, that the inducement to this form of equalization agreement on the part of the carriers was to obtain for them, as plaintiff apparently urges, traffic which would otherwise be likely to *move over land-grant lines* with which the equalizing lines must compete."[2]

Petitioner contended in the court below that under the language of the Equalization Agreement and its obvious purpose, petitioner is only required to equalize net rates *computed via competitive land-grant routes; that is, routes over which Government traffic might normally move in the absence of the agreement.* Respondent, on the other hand, took the flat position that under the agreement petitioner is required to equalize net rates computed via the land-grant route in fact producing the lowest net rate, *regardless of whether such route is competitive, i.e. regardless of whether such route is or is not one over which Government traffic might normally move in the absence of the agreement, and regardless of how circuitous and impractical it may be.*

The court below ignored the proved and admitted purpose of the Equalization Agreement, and made a finding directly contrary thereto (Finding 3, R. 26-28). It then held that the agreement was plain and not subject to construction; and, in effect, that the word "available" was synonymous with the word "applying" and that inasmuch as petitioner's tariff rates technically "applied" via routes used by the respondent in computing the net rates, those rates were "available" within the meaning of the agreement, regardless of the unreasonable and impractical nature of the land-grant routes used to produce them (R. 42-47).

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[2] Italics respondent's.

(1) *The First Cause of Action.*

In the summer of 1934, the Federal Surplus Relief Corporation, a duly authorized agent of respondent, shipped over petitioner's lines and its connections the 147 shipments of livestock (cattle) listed in Exhibit 4 to the petition herein (R. 20A), from points in Minnesota, Kansas, Illinois, Iowa, Missouri, Wisconsin, and Nebraska to points in North Carolina, South Carolina, Georgia, and Virginia. Petitioner abandoned the undercharges originally claimed on 17 of the foregoing shipments, including all shipments destined to points in Georgia and Tennessee. All of the shipments listed in said Exhibit 4 consisted of drought cattle moved by respondent from drought-stricken areas to grazing lands in the South (Findings 4, 5 and 10, R. 28, 33).

The shipments generally moved via direct routes from origins to destinations, the great majority through such junctions as Cincinnati, Ohio, and Elkhorn City, Kentucky (Finding 8, R. 30), but because of the equalization agreement the net charges thereon were not computed by either petitioner or respondent over said routes (Finding 7, R. 29). Petitioner conceded that under the equalization agreement respondent was entitled to the benefit of deductions from the commercial rates on account of land-grant mileage on all shipments from their respective origins to Cairo, Illinois, and both petitioner and respondent computed the net charges via the same land-grant routes as far south as Cairo. Hence, there is no dispute regarding net charges north of Cairo (Finding 6, R. 29).

At that point, however, petitioner's and respondent's rate-making routes diverged. Petitioner computed the net charges from Cairo to the respective destinations via Illinois Central Railroad to Martin, Tennessee; thence via Nash-

ville, Chattanooga & St. Louis Railway to Nashville, Tennessee; thence via Tennessee Central Railroad to Harriman, Tennessee; thence via petitioner's line to destination. This route does not contain any land-grant mileage (Finding 7, R. 29).

Respondent used two different routes in computing the net charges south of Cairo to the respective destinations. On Items 121, 141, 142 and 143, of said Exhibit 4, respondent computed the net charges from Cairo to destination via Mobile & Ohio Railroad to Meridian, Mississippi; thence via Alabama Great Southern Railroad to Birmingham, Alabama; thence via Louisville & Nashville Railroad to Montgomery, Alabama; thence via Central of Georgia Railway to Columbus, Georgia; thence via petitioner's line to destination. On all other shipments listed in said Exhibit 4, respondent computed the net charges from Cairo to destination via Mobile & Ohio Railroad to Meridian, Mississippi; thence via Alabama Great Southern Railroad to Birmingham, Alabama; thence via Louisville & Nashville Railroad to Calera, Alabama; thence via petitioner's line to destination. These routes include certain land-grant mileage of the Mobile & Ohio Railroad between Cairo and Meridian; of the Alabama Great Southern Railroad between Meridian and Chattanooga; of the Louisville & Nashville Railroad between Birmingham and Montgomery; of the Central of Georgia Railway between Montgomery and Columbus; and of petitioner between Calera, Alabama, and Spartanburg, South Carolina (Finding 8, R. 30).

Petitioner's and respondent's rate-making routes are shown on a map filed in the court below as plaintiff's Exhibit 26, said exhibit being made a part of the Special Findings of Fact by reference (Finding 10, R. 33). Petitioner's rate-making route south of Cairo is shown thereon in green; respondent's route in blue; certain alternative

routes in yellow, and land-grant mileage in red.[3] The mileage via the route of actual movement, the mileage via petitioner's rate-making route, and the mileage via respondent's rate-making routes, and the excess mileage of respondent's rate-making routes over the route of actual movement are shown on a table appearing on pages 31-33 of the record (Finding 9). As there shown, the mileage of respondent's route through Meridian, Mississippi, and Columbus, Georgia, on shipments covered by Items 121, 141, 142 and 143 of said Exhibit 4, exceeded the mileage of actual movement well over 550 miles. On the remaining shipments the mileage of respondent's route through Meridian, Mississippi and Birmingham and Calera, Alabama, exceeded the mileage of the route of actual movement in all but 17 cases by from 300 to over 600 miles. On those 17 shipments, respondent's route exceeded the route of actual movement from 137 to 289 miles.

Said rate-making routes relied on by respondent are not used for the movement of commercial traffic and if actually used by respondent would have required two or three stops for feed, water and rest additional to those required on the route in fact traversed, and a minimum of three additional days in transit. Each stop for food, water and rest would have cost respondent a minimum of $2.50 per car. The number of cars in each shipment ranged from 1 to 19, with an average of 5 cars to a shipment (Finding 10, R. 33). On this basis the cost to repsondent, if the shipments had actually moved over the respondent's rate-making routes, would have amounted to $25.00 for two stops and to $37.50 for three stops. A reference to Exhibit 4 to the petition herein (R. 20A) will show that this extra expense of $27.50 for three stops would have actually exceeded the savings in

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[3] The alternative routes are not material for the purpose of this petition and the review here sought and will not be further noticed.

transportation charges incident to the use of such routes on 57 out of the 130 shipments on which petitioner sought judgment. On the basis of only two stops via respondent's routes, the cost of $25.00 would have actually exceeded the savings in rates incident to the use of such routes on 40 out of the 130 shipments. When it is considered that out of the entire 130 shipments the savings in rates incident to the actual use of respondent's routes would have exceeded $100.00 on only 27 of them, it is apparent that where the increased expense did not actually exceed the savings, such savings would have in all cases have been very materially reduced.

Furthermore, in addition to the increased cost as above stated, the actual use of respondent's routes would have confined the distress livestock in the cars a minimum of three days more than was required on the route in fact traversed, and would have subjected them to a gruelling and hazardous journey through the deep south during July, August, and September, exceeding in most cases by hundreds of miles the routes actually travelled (Findings 9 and 10, R. 30-34).

It is plain from the foregoing that the routes used by respondent in computing the net rates are impractical and non-competitive on traffic from the origins to the destinations here involved and petitioner's transportation witness of thirty-seven years' experience so testified (R. 49-51). The court below failed to find these ultimate facts, which are fully supported by the record, and erred in so failing.

(2) *The Second Cause of Action.*

Between July 24, 1934, and February 17, 1938, there was shipped over petitioner's lines and its connections by, or on behalf of, the Tennessee Valley Authority, a duly authorized agency of the United States, the 227 shipments

of Government property listed in Exhibit 8 to the petition herein (Finding 12, R. 35). Petitioner abandoned the alleged undercharges on a large number of said shipments and now claims undercharges only on the items listed in Finding 13 (R. 35).

With the exception of the shipments covered by Finding 18 (R. 38) from Chicago, Illinois, to Coal Creek, Tennessee, all these shipments moved from origin to destination via petitioner's line direct for comparatively short distances, ranging from 44 to 200 miles, and petitioner claimed the full commercial rates applying via said routes. Respondent, in order to take advantage of land-grant routes, computed the net rates over routes from three to nine times the length of the routes of actual movement, the percentage of circuity of the rate-making routes over the routes actually used ranging from 257% on the shipments covered by Finding 19 to 893% on the shipments covered by Finding 14 (R. 36). Respondent's rate-making routes are not used for the movement of commercial traffic and include the lines of at least three different railroads (Findings 14, 15, 16, 17, 19, 20, 21, 22 and 23, R. 36-41). If the shipments involved had actually moved over respondent's said routes they would have been greatly delayed in reaching destination and would have been subjected to greatly increased risk of loss or damage, said increased risk being due both to increased mileage and the necessity of interchange or transfer between the railroads involved.

On shipments from Chicago, Illinois, to Coal Creek, Tennessee, covered by Finding 18 (R. 38), petitioner's rate-making route south of Cairo, and respondent's rate-making route south of that point are the same as those involved on the great majority of the shipments embraced in the first cause of action.

II.

The Questions Presented and Errors Assigned.

1. There is no evidence to sustain the finding of the court below as to the purpose of the Equalization Agreement and it erred in finding the purpose of said agreement to be:

> "3. The purpose and effect of the freight equalization agreements of the defendant with plaintiff and with other common carriers was to equalize rates on Government property over various routes serving the same point of origin and destination, where one or more of those routes had been aided in whole or in part by grant of public lands, rates over all routes from point of origin to destination being brought down to the level of that over the route producing the lowest net rate on account of land-grant deduction.
>
> "This arrangement was designed to give the equalizing carrier a portion of the Government business that was possible of routing over the governing land-grant route, and to give the Government a greater range in choice of routes where considerations of economy entered into the selection" (R. 26-27).

2. The court below erred in failing to find that the purpose of the Equalization Agreement was to obtain for petitioner Government traffic which in the absence thereof might move over competing land-grant routes.

3. The court below erred in failing to find, as the Commissioner found, that the routes used by respondent for rate-making purposes on the cattle shipments embraced in the first cause of action are impractical.

4. The court below erred in failing to find that the routes used by respondent for rate-making purposes on the cattle shipments embraced in the first cause of action are so circuitous as to be non-competitive on such traffic from the origins to the destinations involved.

5. The court below erred in holding that petitioner was required under the Equalization Agreement to equalize rates computed via the routes used by respondent for rate-making purposes.

6. The court below erred in holding that petitioner was required under the Equalization Agreement to equalize rates on the cattle shipments embraced in the first cause of action computed via the routes used by respondent for rate-making purposes.

III.

Reasons Relied On for Allowance of the Writ.

1. The court below has decided a question of general importance which has not been but should be settled by this Court (Rule 41(3) of this Court).

While the Equalization Agreement here involved is between petitioner and respondent solely, practically every common carrier by railroad in the United States, and some common carriers by water, have entered into agreements in substantially the same form in so far as the question here involved is concerned.

These agreements being national in scope, the decision below constitutes a precedent of general application and is of such importance that it should be reviewed by this Court.

Southern Pac. Co. v. *United States*, 307 U. S. 393, 394, and footnote;

Del Vecchio v. *Bowers*, 296 U. S. 280, 285.

2. The decision below creates a conflict in the decisions of the Court of Claims and for that reason should be reviewed by this Court.

Compagnie Generale Transatlantique v. *Elting*, 298 U. S. 217, 221.

In *Louisville & Nashville R. R. Co.* v. *United States*, 61 Ct. Cls. 1, 11, two equalization agreements were before the court; one requiring the carrier to equalize via "usually travelled routes," and the other providing (just as does the agreement involved in this case) that the carriers would equalize "the lowest net rate lawfully available." The shipments moved from New York and New Jersey to Anniston, Alabama, and the Government had computed the rate via Chicago and Cairo, Illinois. The action was to recover the deductions made from the commercial rates on account of land-grant mileage via the Chicago-Cairo route, and the court held that plaintiff was entitled to recover. It pointed out that if the agreement providing for equalization "via usually travelled routes" was controlling, the Chicago-Cairo route was unauthorized because not a usually travelled route. As to the other agreement requiring the plaintiff to accept the "lowest net rate lawfully available," the court said:

> "• • • It is for construction if uncertain in its application and, in the absence of a specific showing as to its applicability, a reasonable construction must prevail.
>
> • • • • • • •
>
> "The use of this route for equalization purposes in the absence of a showing does not appeal. *It is excessive in its roundabout character and increased mileage.* The defendant, upon this question and to sustain its contention, furnishes the testimony of a witness whose theory is that when a railroad company signs an equalization agreement, it agrees to equalize 'with any kind of a route you can imagine or construct.' *Such a view can not be accepted. It is unreasonable.*"

The decision below is in direct conflict with the holding above set out. The court below in this case held that the Equalization Agreement here involved, which is identical

with that discussed in the above excerpt, was plain, and not subject to construction, and that it required petitioner to equalize rates computed via routes in fact producing the lowest net rates, regardless of their "roundabout character and increased mileage."

It is true that in the *Louisville & Nashville* case the court said that it did not intend to hold anything with reference to the Chicago-Cairo route to the extent of establishing a controlling precedent and that it determined only the case before it, but we understand that language to mean, in the light of the entire opinion, that the court was not satisfied with the record as a whole and that because of that fact it did not wish to establish a precedent *as to the particular route involved;* to wit, the Chicago-Cairo route. We do not understand from the opinion that the court entertained any doubt as to the soundness of its holding that the agreement must be construed reasonably.

In any event, the United States acquiesced in the decision. It filed a petition for certiorari but subsequently dismissed the same, 270 U. S. 645.

The court below referred in its opinion to the *Louisville & Nashville* case as being a case "in which the agreement provided for land-grant deductions 'via the longest land-grant mileage * * * over usually travelled routes'" (R. 44). As we have pointed out, in the *Louisville & Nashville* case the court had before it *two* equalization agreements; one requiring equalization via "usually travelled routes," as stated by the court below, and the other providing that the carriers would equalize "the lowest net rate lawfully available." From the brief reference which the court below made to the *Louisville & Nashville* case, it seems to have regarded it as involving only one equalization agreement whereunder the carrier was obligated to equalize

the rates applying over "usually travelled routes," whereas in fact the decision as disclosed above was also based on an agreement requiring the carrier to equalize "the lowest net rate lawfully available," a provision identical with ours.

The decision below is also in direct conflict with a pronouncement of the Court of Claims in the case of *Northern Pacific Ry. Co.* v. *United States*, 72 Ct. Cls. 563, 575. There the court defined the word "available" as used in an equalization agreement requiring the carrier to equalize "the lowest net rates lawfully available," saying:

> "'Available' here means not simply those rates computed on the basis of the actual route taken by the shipment, but net rates that, *by comparison with competing routes*, turn out to be the lowest rates. Thus, on a shipment from coast to coast, moving by way of the Northern Pacific lines, the lowest net rates applicable to Army transportation would not be computed by way of the Northern Pacific if some other *proper* route made a less net rate."

3. The question involved can only be litigated in the Court of Claims, except where the amount involved is for $10,000 or less, in which event the District Courts of the United States have concurrent jurisdiction. In these circumstances, there is far less likelihood of litigation in the District Courts which will ultimately result in a conflict of decisions between the Circuit Courts of Appeals than is true in the ordinary case, and this is an additional reason why certiorari should be granted.

Schriber-Schroth v. *Cleveland Trust Co.*, 305 U. S. 47, 50;

Muncie Gear Works, Inc. v. *Outboard Marine & Mfg. Co.*, 315 U. S. 759, 765, 766.

Wherefore, it is respectfully submitted that this petition for writ of certiorari should be granted.

SOUTHERN RAILWAY COMPANY,
Petitioner.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 578

SOUTHERN RAILWAY COMPANY,
Petitioner,

vs.

THE UNITED STATES,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

I.

The Opinion of the Court Below.

The opinion of the Court of Claims of the United States has not yet been reported, but a copy thereof will be found in the record, beginning at page 25.

II.

Jurisdiction.

The date of the entry of the judgment here sought to be reviewed is October 4, 1943 (R. 47).

This Court has jurisdiction by virtue of 43 Stat. 940, 28 U. S. C. 350, and 43 Stat. 939 (as amended by 53 Stat. 752), 28 U. S. C. 288 (b).

III.

Statement of the Case.

The accompanying Petition for Writ of Certiorari concisely states the relevant facts. Reference to the facts will be made and repeated in the body of this brief only insofar as may be necessary in the discussion of the questions involved.

IV.

Specifications of Errors.

The errors assigned are stated in the accompanying petition, but are repeated here for convenience:

1. There is no evidence to sustain the finding of the court below as to the purpose of the Equalization Agreement, and it erred in finding the purpose of said agreement to be:

> "3. The purpose and effect of the freight equalization agreements of the defendant with plaintiff and with other common carriers was to equalize rates on Government property over various routes serving the same point of origin and destination, where one or more of those routes had been aided in whole or in part by grant of public lands, rates over all routes from point of origin to destination being brought down to the level of that over the route producing the lowest net rate on account of land-grant deduction.
>
> "This arrangement was designed to give the equalizing carrier a portion of the Government business that was possible of routing over the governing land-grant route, and to give the Government a greater range in choice of routes where considerations of economy entered into the selection" (R. 26-27).

2. The court below erred in failing to find that the purpose of the Equalization Agreement was to obtain for petitioner Government traffic which, in the absence thereof might move over competing land-grant routes.

3. The court below erred in failing to find, as the Commissioner found that the routes used by respondent for rate-making purposes on the cattle shipments embraced in the first cause of action are impractical.

4. The court below erred in failing to find that the routes used by respondent for rate-making purposes on the cattle shipments embraced in the first cause of action are so circuitous as to be non-competitive on such traffic from the origins to the destinations involved.

5. The court below erred in holding that petitioner was required under the Equalization Agreement to equalize rates computed via the routes used by respondent for rate-making purposes.

6. The court below erred in holding that petitioner was required under the Equalization Agreement to equalize rates on the cattle shipments embraced in the first cause of action computed via the routes used by respondent for rate-making purposes.

V.

Summary of the Argument.

I.

THE EQUALIZATION AGREEMENT IS AMBIGUOUS, AND IS THEREFORE SUBJECT TO CONSTRUCTION BY THE STANDARD RULES FOR CONSTRUING AMBIGUOUS CONTRACTS.

(1) The Word "Available," as Used in the Equalization Agreement, Is Ambiguous in Itself.

(2) Even If the Word "Available," As Used In the Equalization Agreement, Could Be Deemed Unambiguous in Itself, it Nevertheless Becomes Ambiguous When Applied to the Facts of this Case.

II.

THE PURPOSE OF THE EQUALIZATION AGREEMENT IS TO SECURE FOR PETITIONER COMPETITIVE TRAFFIC, I.E., TRAFFIC WHICH, IN THE ABSENCE OF THE AGREEMENT, MIGHT OTHERWISE MOVE OVER COMPETING LAND-GRANT ROUTES, AND THE COURT BELOW ERRED IN FAILING SO TO FIND.

III.

THE PURPOSE OF THE EQUALIZATION AGREEMENT BEING TO SECURE COMPETITIVE TRAFFIC, I.E., TRAFFIC WHICH, IN THE ABSENCE OF THE AGREEMENT, MIGHT OTHERWISE MOVE OVER COMPETING LAND-GRANT ROUTES, IT SHOULD BE CONSTRUED SO AS TO GIVE EFFECT TO THAT PURPOSE AND, AS THE ROUTES RELIED ON BY RESPONDENT FOR RATE-MAKING PURPOSES ARE NON-COMPETITIVE, PETITIONER IS NOT REQUIRED TO EQUALIZE RATES COMPUTED VIA SUCH ROUTES.

IV.

THE LANGUAGE OF THE EQUALIZATION AGREEMENT STANDING ALONE, WHEN FAIRLY AND REASONABLY CONSTRUED, DOES NOT REQUIRE PETITIONER TO EQUALIZE RATES COMPUTED VIA ROUTES RELIED UPON BY RESPONDENT FOR RATE-MAKING PURPOSES, THE WORD "AVAILABLE" BEING USED IN SAID AGREEMENT IN A RESTRICTIVE, AS DISTINGUISHED FROM A BROAD OR EXTENSIVE SENSE.

V.

THE EQUALIZATION AGREEMENT BEING SUSCEPTIBLE OF MORE THAN ONE INTERPRETATION, IT WILL BE GIVEN A REASONABLE, AS OPPOSED TO AN UNREASONABLE, CONSTRUCTION, AND AN IN-

TERPRETATION REQUIRING PETITIONER TO EQUALIZE NET RATES COMPUTED VIA THE ROUTES RELIED UPON BY RESPONDENT FOR RATE-MAKING PURPOSES WOULD BE SO UNFAIR, UNREASONABLE AND ABSURD THAT IT WILL NOT BE ADOPTED.

VI.

The Argument.

I.

The equalization agreement is ambiguous, and is, therefore, subject to construction by the standard rules for construing ambiguous contracts.

(1) The word "Available," as Used in the Equalization Agreement, is Ambiguous in Itself.

The Equalization Agreement here involved provides that petitioner will accept for the transportation of Government property entitled to reduced rates over land-grant roads, "the lowest net rate lawfully *available*, as derived through deductions account of land-grant distance from the lawful tariffs filed with the Interstate Commerce Commission *applying* from point of origin to destination at time of movement."

The entire controversy in this case turns upon the meaning of the word "available," as used in the paragraph of the Equalization Agreement referred to above. But we do not now take up the merits of that question. Our immediate purpose is to show (1) that the word in itself is ambiguous, and (2) even if this were not true, it nevertheless becomes so when considered in relation to the subject-matter of the contract and the established facts of this case. If either of these propositions be true, the Equalization Agreement is subject to construction according to the accepted canons, one of the most important of which is that a

contract must be construed according to its purpose. And if this agreement is construed according to its proved and admitted purpose, the judgment below must, of necessity, be reversed. The importance of the question justifies the space assigned it.

The court below took the view that the Equalization Agreement was "plain enough, without resort to construction, when it is interpreted according to the ordinary signification of the language used, * * *" (R. 43). Strangely enough, however, the court failed to say just what it considered the "ordinary signification" of the language to be.

By looking to the dictionary and judicial definitions of the word "available," we find that it has a variety of meanings, and that it is sometimes used in a broad or extensive sense and sometimes in a restrictive sense. We deduce from the opinion below that the court was of the view that the word "available," given its ordinary signification, means "usable," or "at one's disposal." Hence, if a tariff rate technically *applies* via a given route, that rate is "available," within the meaning of the Equalization Agreement, regardless of whether the route over which it applies is a competitive route, i.e., one over which the traffic might normally move in the absence of the agreement, and regardless of how impractical and unreasonable it might be. Under this view, if a rate "applies" over a given route, it is "available" in the sense that it is "at the disposal" of the respondent, or is "usable" by it for rate-making purposes, regardless of whether it could *actually* be used to any advantage or to accomplish any purpose. But the word "available," as will be shown below, is ordinarily used in a more restricted sense as meaning "capable of being employed or made use of *with advantage*," "*suitable* for the accomplishment of a purpose," and so forth. We here consider both dictionary and judicial definitions of the controversial word.

Dictionary Definitions of "Available"

Funk & Wagnalls ascribe to the word "available" a variety of meanings. Those more nearly applying to the word, as here used, are:

> "Capable of being employed or made use of with advantage; suitable for the accomplishment of a purpose; usable; at one's disposal."

Webster's New International Dictionary gives substantially the same definitions, to-wit:

> "Such as one may avail oneself of; capable of being used to accomplish a purpose; usable; convertible into a resource."

It is thus seen from the dictionary definitions that the word "available" has no single meaning. It is capable of being understood in more than one sense, and is, therefore, ambiguous. It is *possible* to say, as did the court below, that an "available" rate is one which is "at the disposal" of respondent, or which is "usable" by it, *but without regard to the circumstances or results of such use.*

To illustrate: While the rates here involved *technically* applied via the routes relied upon by respondent for rate-making purposes, and hence were *theoretically* at the disposal of respondent, or usable by it, they could not have been *actually* used to any advantage or for the accomplishment of any real purpose.

This is made abundantly clear from the facts stated in the accompanying petition. We there showed in detail (pp. 5-8) that the actual use of respondent's rates and routes on the shipments involved in the first cause of action would have cost respondent in *accessorial* charges more than it would have saved in *transportation* charges in a great many instances, and in all others such costs would have substantially reduced such savings. In addition, of course, the

already debilitated livestock would have been confined a *minimum* of three additional days in transit, and would have been subjected to greatly increased risks of death or injury necessarily inherent in a freight train journey of several hundred additional miles.

The shipments involved in the second cause of action would have been forced to move over roundabout routes from *three* to *nine* times the length of a single-line route actually traveled and involving the lines of *at least three* different railroads. The increased risk of loss or damage in such circumstances, due not only to the increased mileage, but also to the necessity of interchange or transfer between railroads, is apparent, to say nothing of the delay consequent upon the use of such circuitous routes.

In the circumstances outlined, the most that can be said is that the respondent's rates and routes *could* have been used, because the tariffs technically applied.

On the other hand, it might be said, with much reason and common sense, that an "available" rate, within the meaning of the Equalization Agreement, is one which is "capable of being employed or made use of *with advantage*," or which is "*suitable* for the *accomplishment of a purpose*," or which is "convertible into a *resource*."

According to the dictionary definitions above set out, these are indeed the preferred senses of the word, any one of which is equally as applicable here. It is plain that the rates relied upon by respondent could not have been *actually* used or employed by it "with advantage." Neither were such rates "suitable for the accomplishment of a purpose" by respondent, nor "convertible into a resource" by it. Rates which, if used, would result in costs exceeding the savings in transportation charges incident to the use of such rates, or which would not effect any substantial saving and, at the same time, expose the property shipped to the hazards of excessively long and roundabout freight-

train service, are certainly not rates which could be used *with* advantage or which are *suitable* for the *accomplishment of a purpose* or which could be converted into a *resource*. As will be shown briefly immediately below and at greater length later on, the word "available" is quite generally construed by the courts in this restrictive sense.

Judicial Definitions of "Available"

The word "available" has been before the courts in many cases and in many different circumstances. No effort is made here to show all the various senses in which the term has been used, because in a great number of cases, the signification given it could not be applied to the contract now before the court. Those decisions most pertinent to the instant controversy follow.

In *Hamilton* v. *Menominee Falls Quarry Co.*, 106 Wis. 352, 81 N. W. 876, the question was whether there had been a fraudulent transfer of certain quarrying properties, and it was necessary to determine what was meant by "available" assets. There the court said:

> "• • • *The ordinary meaning* of 'available' is 'usable, capable of being used *to advantage'*; and we suppose when the word qualifies assets, as here, it must mean property that can be sold, or turned into cash with which to pay debts within a reasonable time. • • •"[4] (At page 878 of 81 N. W.).

In *Lively* v. *American Zinc Co. of Tennessee*, 137 Tenn. 261, 191 S. W. 975, the court construed the word "*available*" as used in a safety appliance statute, saying:

> "the words in our statute are 'safe and available.' The latter word means *suitable* or usable." (At page 978 of 191 S. W.)

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[4] All italics ours unless otherwise indicated.

Other cases, more fully discussed *infra*, have held that the word "available" means capable of being used to accomplish the purpose intended by the contract or the statute involved, *Woodley Petroleum Co.* v. *Arkansas Louisiana Pipe Line Co.*, 179 La. 136, 153 So. 539; *Bay City Dredge Works* v. *Fox*, 245 Mich. 523, 222 N. W. 747.

Still other cases, greatly in the minority and not warranting further notice, have accorded the word "available" the signification apparently given it by the court below, holding it to mean "accessible" or "at one's disposal." *Nemo* v. *State*, 178 Misc. 328, 34 N. Y. S. (2d) 40; *Schwabacher Hardware Company* v. *Miller Sawmill Company*, 90 Wash. 193, 155 Pac. 767.

Enough has been said to show that, according to both dictionary and judicial definitions, the word "available" is capable of being understood in more than one sense, and is, therefore, an ambiguous term. But here we have more than that to show that the word, as used in the Equalization Agreement, is indubitably an ambiguous one. For what other conclusion could suggest itself to reasonable minds from the fact that the court below first held in *Louisville & Nashville R. R. Co.* v. *United States*, 61 C. Cls. 1, 11 (discussed on pages 10-13 of the accompanying petition) that an equalization agreement, worded identically as the one here involved, was "uncertain in its application," and in the only two subsequent cases involving such an agreement, *Northern Pacific R. R. Co.* v. *United States*, 72 C. Cls. 562, 565, and the instant case, reached opposite conclusions as to the proper interpretation of the disputed term? We submit that this is conclusive evidence that the Equalization Agreement is an ambiguous contract.

The word "available," then, being reasonably capable of more than one interpretation, is an ambiguous term and subject to interpretation by use of the accepted canons of

construction. The rule as to the test of ambiguity is stated in the recent case of *Buchanan* v. *Swift* (C. C. A.—7th) 130 F. (2d) 483, 485. There the court was considering a contract for the maintenance of plaintiff and her two children, and the question was whether the contract was ambiguous, justifying proof of the surrounding circumstances and the object of the parties in making the agreement. On this point the court said:

> "However, before it can be said that there is no ambiguity, the court must conclude that the controversial words are *only capable of one interpretation*, * * * Since the plaintiff's interpretation, in the light of the entire contract, is reasonable enough to preclude us from saying that the District Court's interpretation *was the only one*, we must conclude that paragraph one is ambiguous. Under the circumstances here appearing, we believe the court would be justified in admitting proof of the circumstances surrounding the parties and the object they had in view at the time the contract was made, * * *"

The foregoing rule is too well established to require further discussion. We refer only to the following authorities: *London & Lancashire Indemnity Co. of America* v. *Neil Barron Fuel Co.*, (W. D.—Mo.) 31 F. Supp. 599, 600-601; *Mudgett, et al.*, v. *The United States*, 9 C. Cls. 467; *Thomas, et al.*, v. *Jewell, et al.*, 300 Mich. 556, 2 N. W. (2d) 501, 503; *Wheelwright* v. *Pure Milk Ass'n.*, 208 Wis. 40, 240 N. W. 769, 772; *Paisley* v. *Lucas*, 346 Mo. 827, 143 S. W. (2d) 262; *Blevins* v. *Riedling*, 289 Ky. 335, 158 S. W. (2d) 646.

What we have thus far said has been confined to the proposition that the word "available" is *in itself* ambiguous. We submit that that proposition has been quite fully established. Nevertheless, we now wish to notice briefly the principle that, even though a contract may be deemed clear and un-

ambiguous *in the abstract*, it may, when applied to the facts, become ambiguous and uncertain in meaning so as to require construction.

(2) *Even If the Word "Available," as Used in the Equalization Agreement, Could be Deemed Unambiguous in Itself, it Nevertheless Becomes Ambiguous When Applied to the Facts of This Case.*

It is a well-established rule that, although the words of a contract may be clear and unambiguous *in themselves*, they may, nevertheless, become uncertain and ambiguous when applied to the facts proved, and thus require interpretation.

A recent case on the subject is *Order of United Commercial Travelers of America* v. *Sevier* (C. C. A.—8th), 121 F. (2d) 650, 654. There the court was construing a contract of insurance, and in the course of its opinion, said:

> "A contract may or may not be ambiguous, uncertain or obscure, dependent upon the proven facts. • • • As applied to the facts in this case, this provision is to say the least uncertain, and the intention of the parties is not clearly apparent. • • •"

Another comparatively recent case is *Arkansas Amusement Corporation* v. *Kempner* (C. C. A.—8th) 57 F. (2d) 466, 473-4. There the court said:

> "• • • Of course the words used in a contract, while not ambiguous in the abstract, may, when considered in relation to the circumstances surrounding the making of the same, create an ambiguity requiring interpretation. • • •"

The leading case on the point under consideration in the state courts is *Klueter* v. *Joseph Schlitz Brewing Co.*, 143 Wis. 345, 128 N. W. 43, 45. There the court laid down the rule as follows:

> "It is said that, when the language of a contract is plain, it is not open to construction. That is true in

> the general sense, but, unless viewed broadly, it does not convey accurately the full scope of the field where rules for construction are applicable. The words of a contract, in themselves, may be plain, yet when applied to the situation with which it deals, not plain, *the literal sense leading to such unreasonableness as to suggest that the parties probably did not so intend.* * * * As to when the language of a contract, in its literal sense, is to be taken as expressing the intention of the parties, is correctly indicated by Vattel's rule which has been often cited by this and other courts: 'When the meaning is evident, and leads to no absurd conclusions, there can be no reason for refusing to admit the meaning which the words naturally present.' Note the language 'when the meaning is evident.' *The meaning is not evident when, if looking at the subject-matter, it is so unreasonable as to appear unlikely that the parties so intended.* * * *" (At p. 45 of 128 N. W.)

For additional authorities, see: *Moran* v. *Prather*, 23 Wall. 492, 501; *Mueller* v. *Northwestern Loan Co.*, 125 Wis. 326, 104 N. W. 67; *Murphy* v. *Dilworth*, 137 Tex. 32, 151 S. W. (2d) 1004; *Bamberger Co.* v. *Certified Productions, Inc.*, 88 Utah 194, 48 P. (2d) 489.

If one should adopt the view initially that the Equalization Agreement is plain and unambiguous in itself, requiring petitioner to equalize any rate at respondent's disposal, its unreasonableness, when applied to the facts of this case, becomes so great as to make it appear unlikely that the parties ever intended the contract to have any such meaning and effect. Respondent's rates and routes are utterly impractical, as we have already shown, and we need only say here that, if the Equalization Agreement be construed as above stated, it would require petitioner to equalize rates computed via routes which, because of expense, excessive mileage or other cause, *would never, in fact, be used by respondent!* This, we submit, is such an

absurd and unreasonable result as to create grave doubt that the contract has any such meaning and effect.

From all that has been said, it is plain that the word "available" is capable of being understood in more than one sense and is, therefore, *inherently* ambiguous, rendering the Equalization Agreement on its face doubtful in meaning and intent. It is also clear that, even if this were not true, and the contract standing alone *apparently* required petitioner to equalize any rate at the disposal of respondent, as held by the court below, nevertheless, when so applied to the facts of this case, such an interpretation becomes so unreasonable and leads to such absurd results that the true meaning of the contract becomes uncertain and obscure. In either event the Equalization Agreement is subject to interpretation by the accepted rules of construction.

II.

The purpose of the equalization agreement is to secure for petitioner competitive traffic, i. e., traffic which, in the absence of the agreement, might otherwise move over competing land-grant routes, and the court below erred in failing to so find.

The finding of the court below as to the purpose of the Equalization Agreement is set out in full under "Specifications of Errors," and will not be repeated here. Suffice it to say that the substance of the finding, in part, is that the purpose of the Equalization Agreement is to equalize rates over various routes between the same points so that the rates over all routes would be brought down to the level of that "over the route producing the lowest net rate on account of land-grant deduction." It was further found that the Equalization Agreement was designed to give the equalizing carrier a portion of Government business that

was "*possible* of routing over the governing land-grant route."

There is no testimony in the record or other evidence of any character to support the finding of the court below as to the purpose of the Equalization Agreement. On the contrary, the only testimony on the subject is directly contrary to the finding of the court, as indeed are certain pronouncements of various departments of the Government, *as well as a frank admission by respondent in this very case.*

The purpose of the Equalization Agreement is perfectly plain and well understood. Petitioner's Freight Traffic Manager testified in this case (R. 48-49) that the purpose of the agreement was to "secure the handling of traffic which, in the absence of the agreement might otherwise move over competing railroads." There was no cross-examination of this witness, and his testimony was uncontradicted. Furthermore, as we have said, respondent, in its Brief in the court below, admitted that the purpose of the agreement was as stated by the witness. On page 180 of said Brief, respondent said:

> "It need not be questioned, therefore, that the inducement to this form of equalization agreement on the part of the carriers was to obtain for them, as plaintiff apparently urges, traffic which would otherwise be likely to *move over land-grant lines*[5] with which the equalizing lines must compete."

At least two departments of the Government have also expressly recognized that the foregoing is the obvious purpose of carrier equalization agreements. See *18 Comp. Gen. 691*, discussed *infra*.

It is thus made entirely clear that the purpose of petitioner's Equalization Agreement is *not* (as found by the

[5] Italics respondent's.

court below) to bring down the rates over all routes between two points to the level of that over the route in fact producing the *lowest net rate*, nor to give petitioner a portion of Government traffic that is "possible" of routing over such route. On the contrary, its sole and admitted purpose is to secure for petitioner *competitive* traffic, i. e., traffic which, in the absence of the agreement, would be *likely* to move over *competing land-grant routes*, as distinguished from traffic which is "possible" of routing via the cheapest land-grant route. The distinction is marked and fundamental.

The finding of the court below, therefore, as to the purpose of the Equalization Agreement is clearly erroneous, and should not have been made, while that for which we contend is plainly right and should have been made.

III.

The purpose of the equalization agreement being to secure competitive traffic, i. e., traffic which, in the absence of the agreement might otherwise move over competing land-grant routes, it should be construed so as to give effect to that purpose, and as the routes relied on by respondent for rate-making purposes are non-competitive, petitioner is not required to equalize rates computed via such routes.

We have shown that the word "available" in the Equalization Agreement, is an ambiguous term, and is, therefore, subject to construction by the use of the accepted rules. We have also shown that the purpose of the Equalization Agreement is to secure for petitioner competitive traffic, i. e., traffic which, in the absence of the agreement, might otherwise move over competing land-grant routes.

The established facts of this case, as found by the court below and as stated in the accompanying petition, show beyond question that the rates and routes relied upon by

respondent are not such as respondent ever would have been likely to use if there had been no equalization agreement. We do not here repeat those facts. We do wish to point out, however, that the court below omitted to find (Assignments of Error 3 and 4) as to the shipments involved in the first cause of action that respondent's routes are impractical and non-competitive on traffic from the origins to the destinations involved. In failing so to find, the court committed plain error. These ultimate facts plainly follow from the facts actually found by the court, but in addition, there was ample testimony upon the precise points. Petitioner's transportation witness of thirty-seven years' experience testified unequivocably and without contradiction that respondent's routes were non-competitive and impractical and that "no one would consider routing livestock via such a route and confining your cattle from two to three or four days longer and requiring two to three additional feedings." It is not surprising, under these circumstances, the witness branded respondent's routes as "preposterous" (R. 49-51).

There is attached hereto as Appendix I a map introduced in evidence in the court below as "Plaintiff's Exhibit No. 22," which map illustrates the route of actual movement and petitioner's and respondent's rate-making routes on one of the shipments here involved, respondent's route as there shown being the route used by it on all cattle shipments except four. There is also attached hereto as Appendix II a map introduced in evidence in the court below as "Plaintiff's Exhibit No. 26," which map shows petitioner's rate-making route south of Cairo in green, respondent's two routes south thereof in blue and land-grant mileage in red.[6]

With reference to the shipments involved in the second cause of action, we attach hereto as Appendix III a map

[6] As stated in the accompanying petition, the yellow routes shown on the map are not here material.

introduced in evidence in the court below as "Plaintiff's Exhibit No. 35 (a)," which illustrates the various routes involved on the shipments covered by Finding 14 of the court below (R. 36-37). This map is fairly representative of the general situation on shipments involved in the second cause of action.

Respondent's routes in both causes of action being utterly impractical and such as never would have been used in the absence of the Equalization Agreement, petitioner contends that it it is not obligated to equalize rates computed via such routes, its only obligation being to equalize rates computed via routes which, in the absence of the agreement, might actually be used by respondent. This position is not only in accord with the proved and admitted purpose of the Equalization Agreement, but conforms perfectly to dictionary and judicial definitions of the word "available."

We have shown that the word "available" means "capable of being employed or made use of *with advantage;*" "*suitable* for the *accomplishment of a purpose;*" "convertible into a *resource*." Any of these meanings fits petitioner's contention exactly. As stated, our position is that an "available" rate, within the meaning of the Equalization Agreement, is a rate which, in the absence of the agreement, might be used by respondent for the actual movement of its freight. Now what kind of a rate might respondent use in the absence of the agreement? Certainly not just *any* rate that might lawfully apply and, therefore, be at respondent's "disposal." Plainly it is a rate which respondent could use *to advantage* or for the *accomplishment of its purpose*, or which could be *converted by it into a resource*. It would not use a rate to its *disadvantage* or which would *defeat its purpose*, or which would result in a *liability* to it. Yet, the rates relied upon here by respondent clearly fall within these categories. They could not be used to any advantage whatever because of cost, excessive mileage, and other rea-

sons heretofore explained in detail. Under such circumstances, it is plain that the rates and routes relied upon here by respondent never would have been used by it in the absence of the Equalization Agreement, and hence petitioner is not required to equalize such rates.

We have shown in the accompanying petition that the decision in the instant case is in direct conflict with prior decisions and pronouncements of the court below, and we will not go over all that again, but we do wish to repeat for convenience the language of the court in *Northern Pacific R. R. Co.* v. *United States*, 72 C. Cls. 562, 565. There the court below construed the word "available," as used in these carrier equalization agreements, in precisely the way in which we here contend it should be construed. There the court said:

> "* * * 'Available' here means not simply those rates computed on the basis of the actual route taken by the shipment, but net rates that, *by comparison with competing routes*, turn out to be the lowest rates. Thus, on a shipment from coast to coast, moving by way of the Northern Pacific lines, the lowest net rates applicable to Army transportation would not be computed by way of the Northern Pacific if some other *proper* route made a less net rate. * * *"

The Equalization Agreement here in issue reads exactly like that involved in the above case, and should be construed in the same way. For a rate to be "available" within the meaning of the agreement, it must be computed by a competitive land-grant route, i. e., a route over which the traffic might move in the absence of the agreement, and if there should be more than one such land-grant route, the one producing the lowest net rate may be used.

The same construction is put upon carrier equalization agreements by the Interstate Commerce Commission, a body peculiarly well informed and conversant with car-

rier matters. In *Increased Railway Rates, Fares and Charges, 1942*, 248 I. C. C. 545, 558, 608, commonly known as "Ex Parte 148," the Commission said:

> "The carriers were unable to supply information as to the extent to which their revenues would be depressed in 1942 on account of the rate concessions which must be made on traffic over land-grant routes *and routes competitive therewith:* * * * These land-grant rates apply only upon certain roads and portions thereof, *but are competitively extended to others.* They are now applied to a large and even an increasing proportion of all the shipments made by the Government."

In the above case the Commission did not mention specifically carrier equalization agreements, but obviously it could have had nothing else in mind when it said that rate concessions must be made on traffic over land-grant routes and "routes competitive therewith."

An identical construction has been placed upon carrier equalization agreements like that here involved, by the Secretary of the Treasury and the Comptroller General. In *18 Comp. Gen. 691, 694*, the Comptroller General quoted a letter from Secretary of the Treasury in part as follows:

> "This Department (Treasury) concurs with you (Comptroller General) in the conclusion stated in your letter (pages 5 and 6) that '* * * the route which is sought to be equalized * * * apparently is not used commercially for the movement of gravel from Waters to West Point *and could not reasonably be considered as being a competing route and since the obvious purpose of the carrier's land-grant equalization agreement is to obtain for the carrier traffic which might otherwise move over competing routes, it is not believed that the equalization agreement should be construed so as to require equalization of the land-grant distance in the extremely circuitous route which, apparently, would not have been used for the movement of*

the considered traffic * * *.' This is a principle which Government agencies have long sought to have established and it will materially aid in simplifying the computation of land-grant rates. Furthermore, it will undoubtedly meet with the unqualified approval of the carriers generally. * * *"

And in the body of the opinion, the Comptroller General said:

"But * * * there remained the fact that the wide disparity between the two routes, the one involving a direct one-line haul of approximately 12 miles and the other a four-line haul of 342 miles, was such as to appear clearly not within the *obvious purpose of the equalization agreement, namely, to obtain for the agreement carriers traffic which otherwise might be transported over a land-grant route.* In the absence of any showing of actual facts or circumstances that might justify the Government in demanding transportation via such a route, certainly it cannot reasonably be assumed that any such routing as via the longer line could be in the Government's interests, and the application of the agreement as requiring acceptance of a net rate as via said route would so far transcend any benefits reasonably available *without the agreement as not to be justified in any reasonable view of its purpose and the effect to be given it.*"

Aside from its value as a general precedent, the foregoing decision of the Comptroller General should be especially noticed for the additional reason that it discloses that the principle there enunciated and for which we here contend, to-wit, that carrier equalization agreements should not be construed so as to require equalization via extremely circuitous routes which would never in fact be used, is one "which Government agencies have long sought to have established, and it will materially aid in simplifying the computation of land-grant rates." This statement, by a Governmental agency which unquestionably knows more

about land-grant rates than any other, is a complete answer to the view expressed by the court in the opinion below that "the construction for which plaintiff contends would unavoidably result in uncertainty, confusion and constant controversy, as the facts in this case so clearly demonstrate." *If the facts in this case show uncertainty and confusion, it is because the construction put upon carrier equalization agreements by the Comptroller General in the above case, and here contended for by petitioner, has not been authoritatively established.*

The above decision by the Comptroller General should also be especially noticed because it is peculiarly applicable to the facts surrounding the shipments involved in the second cause of action. There the shipments, with one exception, moved over short, direct, one-line routes, and respondent sought to compute the net rate via routes involving at least a three-line haul and exceeding from three to nine times the length of the route of actual movement. The wide disparity between these routes is clearly unjustified, and is no more within the obvious purpose of the Equalization Agreement than those involved in the above decision.

The foregoing discussion shows that in every instance, prior to the decision in this case, where the court below, the Interstate Commerce Commission or any Government department had occasion to construe carrier equalization agreements like that here involved, it was uniformly held that they should be construed to require equalization by competitive routes, i. e., routes over which the traffic might normally move in the absence of the agreement. All of these decisions are either expressly or by necessary implication bottomed upon the obvious and well-known purpose of carrier equalization agreements, and are in complete accord with both dictionary and judicial definitions of the terms thereof. Yet, in the instant case, the court below ignored all that had been said upon the subject, arbitrarily

adopted an extensive definition of the word "available," *and completely ignored the proved and admitted purpose of the contract before it.*

The proposition that a contract must be construed according to its purpose and so as to give effect to that purpose is too well settled to require anything more than the briefest reference to the authorities. In *Legal Tender Cases*, 12 Wall. 457, 531, 532, this Court said:

> "• • • If the general purpose of the instrument is ascertained, the language of its provisions must be construed with reference to that purpose and so as to subserve it. • • •"

A more recent expression of the rule is found in *Exum, et al.* v. *Laub* (C. C. A.—5th), 87 F. (2d) 73, 74. There the court said:

> "• • • If the phrase in question be regarded as ambiguous, however, or susceptible of more than one shade of meaning, that interpretation will be adopted which the context in which it is found, the business to which it relates, and the circumstances in which it is used, disclose that the parties intended it to have, giving due weight to the purpose to be attained. • • •"

And in *Price, et al.* v. *Stonega Coke & Coal Co., et al.* (S. D.—W. Va.), 26 F. Supp. 172, 178, the court said:

> "• • • Where a contract is made for the accomplishment of one main purpose, every provision must be read in the light of such provision. • • •"

See also: *Restatement, Contracts*, Sec. 236 (b); *III Williston on Contracts (Revised Edition)*, Sec. 619; *Page I, Supplement to the Law of Contracts*, Sec. 2039; *Southern Ry. Co.* v. *Stearns Bros.* (C. C. A.—4th), 28 F. (2d) 560, 562; *Cities Service Gas Co.* v. *Kelby-Dempsey & Co.* (C. C. A.—10th), 111 F. (2d) 247, 249; *Hull* v. *Magnolia*

Petroleum Co. (C. C. A.—5th), 119 F. (2d) 123, 125; *United States* v. *D. L. Taylor Co.* (E. D.—N. C.), 268 F. 635, 639.

Under the foregoing principles it is clear that the construction placed upon carrier equalization agreements, like that here involved, by the Interstate Commerce Commission, the Comptroller General and, until the decision in the instant case, by the court below, is the correct one. The admitted purpose of petitioner's Equalization Agreement being to secure competitive traffic, i. e., traffic which, in the absence of the agreement, might move over competing land-grant routes, it must be construed so as to give effect to that purpose. And when that is done, it is plain that petitioner is not required to equalize rates computed via the routes relied upon by respondent, all of which are unduly circuitous, unreasonable and impractical, and are not such as would actually be used by respondent in the absence of the Equalization Agreement.

IV.

The language of the equalization agreement standing alone, when fairly and reasonably construed, does not require petitioner to equalize rates computed via routes relied upon by respondent for rate-making purposes, the word "available" being used in said agreement in a restrictive, as distinguished from a broad or extensive sense.

We have already demonstrated that the word "available" is used in petitioner's Equalization Agreement in a restrictive, rather than in a broad and extensive sense. That is very clear, indeed, when the term is considered in the light of the admitted purpose of the agreement. But we do not rely alone upon that rule of construction to establish the proper interpretation of the contract. The same result follows when the language of the agreement is analyzed and

considered from the standpoint of reason and common sense.

As heretofore stated, the word "available" is occasionally given a broad signification. In that sense it means "at one's disposal," and as applied to the facts of this case by the court below, an "available" rate is any rate that might *apply*, all such rates being at respondent's disposal, but regardless of circumstances. On the other hand, the word "available" is generally used in a more restricted sense, meaning "capable of being employed or made use of *with advantage*".

In these circumstances we must be guided by the principle laid down by this Court as long ago as *Church* v. *Hubbart*, 2 Cranch 165, 172. There it is said:

> "• • • and wherever words admit of a more extensive or more restricted signification, they must be taken in that sense which is required by the subject matter, and which will best effectuate what it is reasonable to suppose was the real intention of the parties."

Bearing this principle in mind, let us examine closely the language of the Equalization Agreement. It provides, in substance, that petitioner agrees to accept for the transportation of Government property entitled to reduced rates over land-grant roads "the lowest net rates lawfully *available*, as derived through deductions account of land-grant distance from the lawful rates filed with the Interstate Commerce Commission *applying* from point of origin to destination at time of movement."

To construe the word "available" to mean "at one's disposal", so that an available rate is any rate that lawfully applies and could possibly be used, is really to give it no meaning at all. For in that sense the word "available" is synonymous with the word "applying," and one

or the other might as well have been omitted from the contract. Indeed, at one point in its discussion of the contract, the court did omit the word "applying," saying: "Which (route) shall be chosen if we depart from the clear and definite language of the Equalization Agreement which gives the Government 'the lowest net rates lawfully available * * * from point of origin to destination at time of movement.'" This language is significant, and plainly shows that the court regarded the word "available" as being synonymous with the word "applying." In doing so, it violated the elementary principle of construction that, in construing a written contract, "an instrument should be interpreted by the context so as, if possible, to give a *sensible meaning and effect to all its provisions;* and so as to avoid rendering portions of it contradictory *and inoperative,* by giving effect to some clauses to the exclusion of others." *Ladd* v. *Ladd,* 8 Howard 10, 28; *Green County, Ky.* v. *Quinlan,* 211 U. S. 582, 594.

Every word in a written instrument is presumed to have been used advisedly, and in the instant case it is apparent, from what we have just said, that the word "available" was inserted for a limiting or qualifying purpose; otherwise, there would have been no reason to use it in addition to the word "applying."

The case of *Hamilton* v. *Menominee Falls Quarry Co.,* 106 Wis. 352, 81 N. W. 876, 887, illustrates the restricted use of the word "available." There the question was whether there had been a fraudulent transfer of certain properties, and it was necessary to determine what was meant by the term "available assets." On this point the court said:

> "* * * The word 'available' must have been inserted for some *limiting or qualifying purpose.* It must have been intended as including certain assets and excluding others, else there was no reason for its use. *The ordinary meaning* of 'available' is 'usable, capable

> of being used *to advantage'*; and we suppose when the word qualifies assets, as here, it must mean property that can be sold, or turned into cash with which to pay debts within a reasonable time. * * *". (At p. 878 of 81 N. W.)

The word "available" is used in the Equalization Agreement in the same restricted sense as in the above case. It must have been intended to include certain rates and to exclude others. Giving the term its ordinary meaning of "capable of being used *to advantage,*" it clearly excludes respondent's rates, as they could not have been so used.

Another case in which the word "available" is held to have been used in a restrictive sense is *Bay City Dredge Works* v. *Fox,* 245 Mich. 523, 222 N. W. 747, 748. There the plaintiff, holder of certain drain orders, demanded that they be paid out of the general funds in the County Treasury, the drain fund itself being deficient. Plaintiff based his right to be paid out of the general funds on a statute providing that drain orders may be paid out of "any moneys in the general fund of the County Treasury that may be available." The court denied recovery, saying:

> "* * * The term 'available' is employed in a *restrictive sense,* and opens the fund for the purpose of drain orders *only in case the moneys on hand are capable of use for such purpose,* and this requires consideration of the nature and extent of the fund and present and prospective demands upon the same for ordinary current county expenses.
>
> "The record discloses that the moneys in the fund are not capable of being used to accomplish the purpose sought by plaintiff. The statute states and intends that drain orders be paid out of any moneys in the general fund of the county treasury that may be available, *and that means out of moneys capable for use for such purpose,* and does not mean payment out of any moneys in the treasury whatsoever, regardless

of ordinary current county needs and expenses." (At p. 748 of 222 N. W.)

The statute in the above case provided that drain orders could be paid from any moneys in the County Treasury that might be "available," but the court held that plaintiff's drain orders were not entitled to be paid out of any moneys in the treasury whatsoever, regardless of the ordinary current county expenses.

In the instant case the Equalization Agreement provides that petitioner will equalize the lowest net rate lawfully "available," but this does not mean that respondent has the right to use any rate that might apply, regardless of circumstances.

Mineral Park Land Co. v. *Howard, et al.*, 172 Cal. 289, 156 Pac. 458, 459, is a pertinent and interesting case. There the defendant contracted to take from plaintiff's land all gravel needed for certain construction work. He actually took only about one-half of what was needed, and obtained the remainder elsewhere, because the gravel left on plaintiff's land was under water and not obtainable, except at great effort and expense. Suit was brought to recover the contract price of the gravel not taken. The trial court found that the defendant had taken all "available" gravel, using the word to mean "capable of being taken and *used advantageously*," but granted recovery on the theory that it was not impossible for defendant to perform his contract. While the State Supreme Court reversed the trial court, holding that the parties had assumed that the land contained the requisite quantity of gravel available for use, it, in effect, affirmed the trial court's interpretation of the word "available," saying:

"* * * And, in determining whether the earth and gravel were 'available,' we must view *the conditions in a practical and reasonable way.* Although there was

gravel on the land, it was so situated that the defendants could not take it by *ordinary means, nor except at a prohibitive cost.* * * *" (At pp. 459-460 of 156 Pac.)

Big Vein Pocahontas Co. v. *Browning, et al.*, 137 Va. 34, 120 S. E. 247, 253, is to the same effect. There the question before the court was the proper interpretation of the word "available," as used in a mining lease under which the Pocahontas Company had agreed, among other things, to mine all "available" coal. The court said:

> "Under the terms of the lease fairly and reasonably construed, 'available' coal includes all coal recoverable as a *practical and reasonable mining proposition, considering actual conditions, cost, and all the surrounding circumstances.*"
>
> (At page 253 of 120 S. E.)

As it would have been unreasonable in the *Howard Case* to require defendant to pay for gravel which could not be taken from plaintiff's land except at prohibitive cost, and as it would have been unreasonable in the *Browning* case to require the mining company to mine coal which could not be recovered as a practical mining proposition, so in the instant case it would be unreasonable to require petitioner to equalize rates applying via routes which could not be used by respondent as a practical matter.

We submit that the language of the Equalization Agreement, fairly and reasonably construed, does not require petitioner to equalize rates computed via the routes here relied on by respondent, all of which are unreasonable and impractical, and would never, in fact, be used.

For additional authorities to the same effect as the foregoing, see: *Starling Realty Corp.* v. *State*, 174 Misc. 375, 20 N. Y. S. (2d) 878, 883, aff'd 286 N. Y. 272, 36 N. E. (2d) 201; *Woodley Petroleum Co.* v. *Arkansas-Louisiana Pipe*

Line Co., 179 La. 136, 153 So. 539; *Flavelle, et al.* v. *Red Jacket Consol. Coal & Coke Co.*, 82 W. Va. 295, 96 S. E. 600, 605; *William C. Atwater & Co., Inc.*, v. *Fall River Pocahontas Collieries Co., et al.*, 119 W. Va. 549, 195 S. E. 99, 102.

V.

The equalization agreement being susceptible of more than one interpretation, it will be given a reasonable, as opposed to an unreasonable, construction, and an interpretation requiring petitioner to equalize net rates computed via the routes used by respondent for rate-making purposes would be so unfair, unreasonable and absurd that it will not be adopted.

We have shown that, while the Equalization Agreement is susceptible of more than one interpretation, there is no doubt as to its true meaning and intent when viewed in the light of its purpose, or when the words of the contract themselves, together with the surrounding circumstances, are considered in a reasonable and practicable way. We have established, we submit, that the word "available" is used in the Equalization Agreement in a restrictive sense and that, properly construed, the contract requires petitioner to equalize rates computed by *competitive* land-grant routes, i. e., routes over which the traffic might normally move in the absence of the agreement. The only other possible interpretation is that adopted by the court below, which is, in effect, that the word "available" is used in the Equalization Agreement in a broad or extensive sense, and that an "available" rate, within the meaning of the agreement, is any rate which might happen to apply, and hence be at the disposal of respondent. Under this interpretation, petitioner is required to equalize rates applying via the route in fact producing the lowest net rate, regardless of how circuitous, unreasonable and impractical such route may

be. We now propose to show that this interpretation of the Equalization Agreement is so unfair and unreasonable, and leads to such absurd results, that it will not be adopted here.

It is a familiar rule of law that, where a contract is susceptible of more than one interpretation, it will be given a reasonable, rather than an unreasonable, construction, and in such cases the purpose of a contract bears very strongly upon the question of the reasonableness or the unreasonableness of a particular construction. This rule is so firmly established that we will refer in the briefest way to the authorities.

In *The Aetna Insurance Co.* v. *William C. Boon*, 95 U. S. 117, 128, the court was construing a contract of insurance, and in the course of the opinion, said:

> "Policies of insurance, like other contracts, must receive a reasonable interpretation consonant with the apparent object and plain intent of the parties."

And in *Richardson* v. *Western Oil, Coal & Investment Co.* (C. C. A., 8th) 3 F. (2d) 403, 407, the court, after reaching the conclusion that the contract before it was clear, went on to say:

> "Even if the terms of the contract sued on were not plain, the contentions of appellees could not be sustained. To do so would give to the contract an unfair and unreasonable interpretation and be in contravention of the clear purpose and manifest intention of the parties."

Likewise, in *Phillips Petroleum Co.* v. *Gable* (C. C. A., 10th) 128 F. (2d) 943, 944-945, the court said:

> "Where a contract is fairly susceptible of two constructions, one of which makes it fair and customary and such as prudent men would naturally execute, and the other makes it unusual or such as reasonable men

> would not be likely to enter into, the interpretation which makes it a rational and probable agreement must be preferred."

We might add here that, as shown in the accompanying petition, the court below, in its decision in the *Louisville & Nashville Case*, applied the foregoing rule to an equalization agreement reading like that here involved, holding that, "if uncertain in its application and in the absence of a specific showing as to its applicability, a reasonable construction must prevail."

The state courts apply the same rule. For example, in *Anderson* v. *Aetna Life Ins. Co.*, 75 N. H. 375, 74 Atl. 1051, 1053, the court said:

> "As men in general do not enter into contracts that are absurd or frivolous, or understandingly include in a written contract *stipulations tending to defeat its main purpose*, the inconvenience, hardship or absurdity of one construction *or its contradiction of the general purpose of the contract*, is weighty evidence that such meaning was not intended, when the language is open to a construction which is neither absurd nor frivolous, *and is in agreement with the general purpose of the parties.*" (At p. 1053 of 74 Atl.)

For additional authorities see: III *Williston on Contracts* (Rev. Ed.) *Section 620;* 12 *Am. Jur.* pp. 791-793; *Foye Lumber Co.* v. *Pennsylvania R. Co.* (C. C. A.—8th) 10 F. (2d) 437; *United States* v. *Skinner & Eddy Corp.* (W. D.—Wash.) 28 F. (2d) 373; *Sun Oil Co.* v. *Dalzell Towing Co.* (C. C. A.— 2d) 55 F. (2d) 63; *Champlin* v. *Commissioner of Internal Revenue* (C. C. A.—10th) 71 F. (2d) 23; *United States* v. *I. B. Miller, Inc.*, (C. C. A.—2d) 81 F. (2d) 8.

When we apply the principles announced in the foregoing cases to the facts of this case, it is plain that the construction of the contract for which we contend is sound,

and that adopted by the court below utterly without merit.

At the risk of repetition, we restate briefly the conflicting views. Petitioner's contention is that under the Equalization Agreement it is required to equalize rates computed via *competitive* land-grant routes only; i. e., routes over which the traffic might normally move in the absence of the agreement. Respondent, on the other hand, contended, and the court below held, that under the agreement, petitioner is bound to equalize rates computed via the route in fact producing the lowest net rate, regardless of whether such route is competitive, i. e., regardless of whether such route is, or is not, one over which the traffic might normally move in the absence of the agreement, and regardless of how unreasonable and impracticable it may be.

It ought to be said here that *on all shipments* covered by the first cause of action, petitioner, in accordance with its interpretation of the Equalization Agreement, conceded respondent the benefit of land-grant deductions as far south as Cairo, Illinois, upon the ground that the land-grant routes to that point were reasonable, practicable and competitive. But beyond Cairo, petitioner refused to allow deductions account of land-grant distances, and computed the rate from that point to destinations via a direct, non-land-grant route, contending that respondent's routes south of Cairo were impractical and non-competitive and such as would never have been used by respondent if the Equalization Agreement had not been in effect. *Respondent's sole answer was that the routes used produced the lowest net rates.* That is the only test it recognized, *and it is the only test recognized by the decision of the court below.*

Applying that test to the facts of this case, the result is so unreasonable and absurd that it must be rejected. We again refer to the accompanying petition for a full statement of the facts. We need here only state that the findings below show that, had the respondent actually used the

rates and routes relied upon in the first cause of action, the resultant costs in *accessorial* charges would have exceeded in a large number of cases the savings which might have been effected in *transportation* charges, and in all other instances would have sharply reduced such savings. Additionally, the already debilitated livestock would have been confined to the stock cars a *minimum* of three additional days, and would have been exposed to great risk of death or injury while traveling the several hundred miles by which respondent's routes exceeded the routes of actual movement. Under these circumstances it is certain that respondent would not have used the rates and routes here relied on, and if that be true, the unreasonableness of the construction of the Equalization Agreement adopted by the court below, which requires petitioner to equalize such rates, is so great as to shock the conscience.

Why, may we ask, would petitioner, or any other railroad, agree to equalize rates computed via routes which, whatever the cause, would *never, in fact, be used for the actual movement of Government traffic?* If such traffic would not actually move over the cheapest land-grant route, if there were no Equalization Agreement, why should petitioner enter into a contract to equalize the rate computed via such route? The answer, of course, is that there would be no purpose at all in doing so, and a contract which requires it would be inane and senseless to the last degree. There is certainly nothing in the language of petitioner's Equalization Agreement that compels the construction put upon it by the court below. We submit that such interpretation is so unreasonable and leads to such absurd results that it ought not to be adopted by this Court.

The language of the court in *Nicholson Transit Co.* v. *Nicholson Universal S. C. Co.* (E. D.—Mich.) 43 F. (2d)

427, 432, aff'd 60 F. (2d) 90, is particularly applicable here. There the underwriters on a charter party between libelant and respondent sued in libellant's name to recover from respondent certain sums it had paid on insurance policies, urging an unreasonable and absurd construction of the agreement between libelant and respondent. The court refused to adopt this interpretation of the contract, saying:

> "* * * but a court should be reluctant to interpret a contract in a way that would make it an unreasonable, unnatural, and absurd bargain unless the plain meaning of the contract requires such an interpretation.
>
> "*The interpretation of this agreement urged by libelant would lead to the conclusion that the contracting parties were either stupid or mistaken.* The interpretation contended for by respondent would simply make them ordinarily intelligent and careful. * * *"

And after pointing out the absurdity of the interpretation urged by the underwriters, the court said:

> "* * * The court ought not to interpret the charter in such a way unless it is made necessary by the plain language of the contract. *It would be such an unreasonable bargain for intelligent men to make that, if the language of the charter permits, the court ought to interpret it in the way that reasonable men would think and would act.* While the burden of this defense rests upon the respondent, it seems to me that when it comes to a contention of that kind *common sense creates a presumption.*"

The construction placed upon the Equalization Agreement by the court below makes it such an unreasonable, unnatural and absurd bargain as to lead to the conclusion that petitioner was either stupid or mistaken. We submit that

common sense creates a presumption against such stupidity or mistake and against the making of such a silly contract.

As said by this Court in *The Kronprinzessin Cecilie*, 244 U. S. 12, 24:

> "Business contracts must be construed with business sense, as they naturally would be understood by intelligent men of affairs."

The Equalization Agreement is a "business contract," and a very vital one, but we must say, with great deference, that it has not been construed by the court below "with business sense." Certainly no business man of ordinary intelligence would enter into an equalization agreement which required the equalization of rates via routes which would not, in the absence of such an agreement, be used for the actual movement of freight.

All that has been said applies with equal force to the shipments covered by the second cause of action. Routes there used by petitioner for rate-making purposes are not used for the movement of commercial traffic, and are so circuitous and unnatural they would never, by any reasonable standard, be used for actual shipments in the absence of the Equalization Agreement. Hence, by no reasonable construction could that agreement be held to apply.

The court below recognized the unfair and unreasonable construction placed by it upon petitioner's Equalization Agreement, but seemed to be of the opinion that it could not give any weight to such circumstance in arriving at the proper interpretation of the contract. In this connection, the court said:

> "* * * Any question as to whether it is unfair and unreasonable to require plaintiff to equalize net charges computed at lawful tariff rates via the land-grant routes used by defendant is foreclosed by the tariffs lawfully

on file with the Interstate Commerce Commission. *The question of reasonableness of tariff rates and routes is one over which this court has no jurisdiction.* It has been committed by Congress to the Interstate Commerce Commission." (R. 46).

We contended in the court below, as we do here, that the Equalization Agreement must be given a reasonable, as opposed to an unreasonable, construction, and that an interpretation which required petitioner to equalize rates computed via the routes relied upon by respondent would be so unfair and unreasonable that it would not be adopted. It is plain from the foregoing excerpt from the opinion below that the court entirely misconceived the issue raised by that contention. We concede, of course, that the Interstate Commerce Commission has exclusive jurisdiction over the reasonableness of rates, but no such question is here raised. When we say that it would be unfair and unreasonable in the extreme to construe the Equalization Agreement to require petitioner to equalize the rates relied upon here by respondent, the question raised is one of *contract law*, pure and simple. The sole question is not whether any particular rate is a reasonable rate or not, but whether, under the terms of the Equalization Agreement (providing for reduced rates on Government property, as permitted by Sec. 22 of the Interstate Commerce Act, 49 U. S. C., Sec. 22) petitioner is required to equalize a particular rate. The rates to be charged respondent, whatever they are, are *contractual* rates expressly permitted by the Act, and in determining what the *proper contract rate* is, no question within the jurisdiction of the Commission is involved.

Conclusion.

For the reasons assigned in the petition for certiorari, and in this brief, we respectfully submit, that the writ of

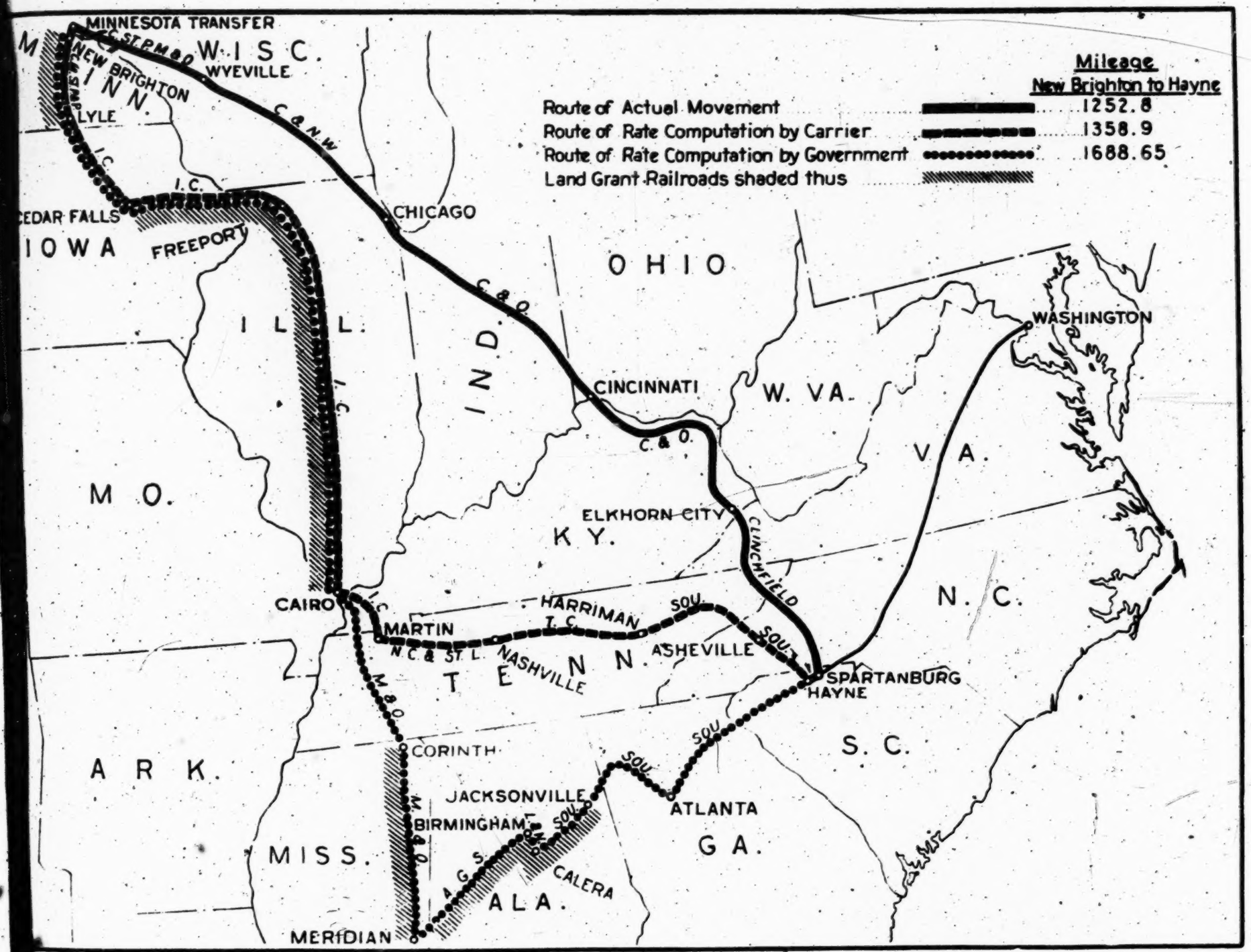
certiorari should be granted, and that, after full consideration of this Court, the judgment and decision of the Court of Claims of the United States herein should be reversed.

Respectfully submitted,

SIDNEY S. ALDERMAN,
SEDDON G. BOXLEY,
Attorneys for Petitioner,
Southern Railway Company.

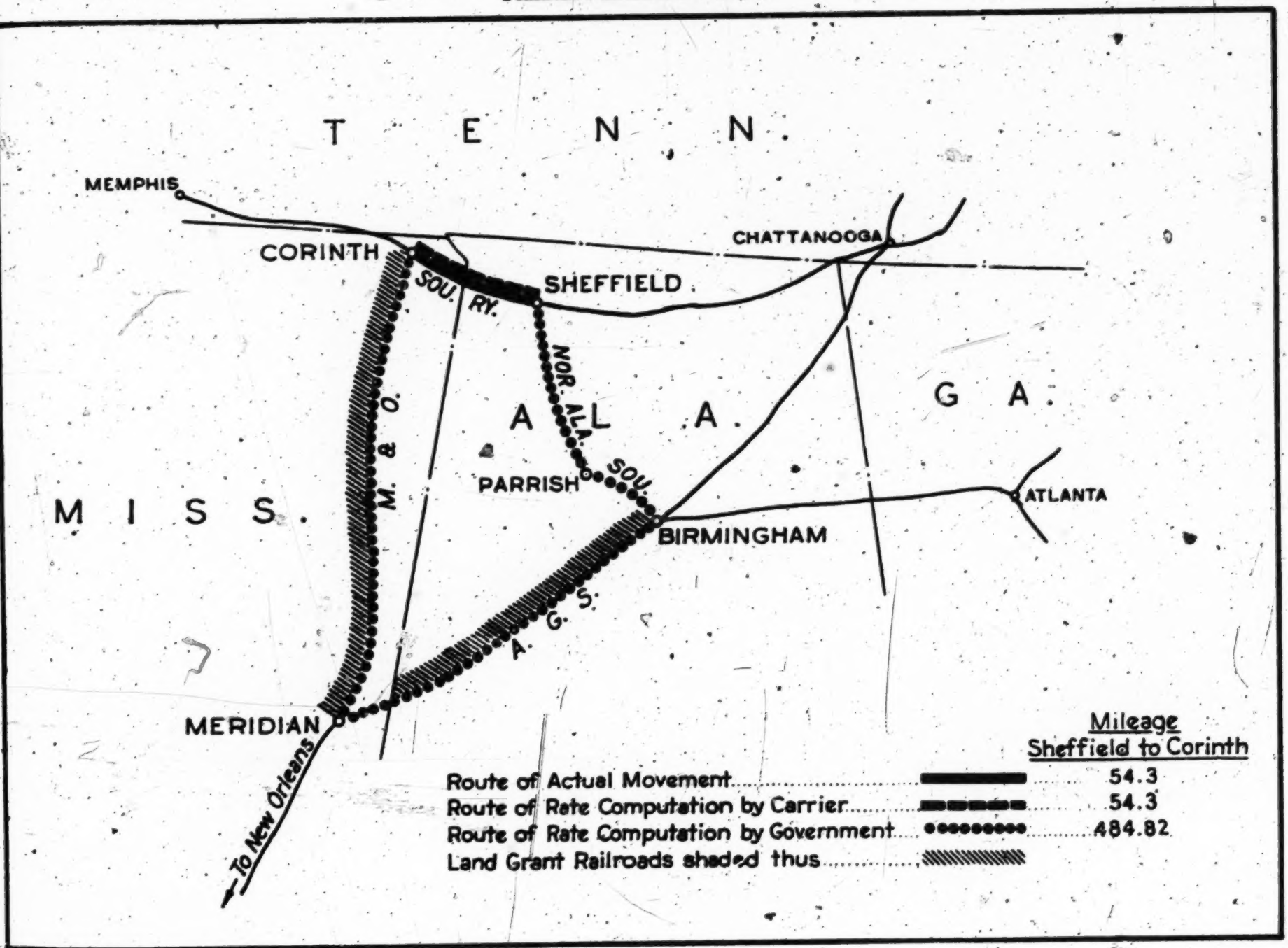
S. R. PRINCE,
Of Counsel.

Plaintiff's Exhibit No. 22.



APPENDIX III.

Plaintiff's Exhibit No. 35(a).



APPENDIX II.

Plaintiff's Exhibit No. 26.